Supreme Court, U.S.
FILED
JUL 20 2000
CLERK

(2)

No. 99-2031

IN THE
# Supreme Court of the United States
October Term, 2000

NME HOSPITAL, INC., ET AL.,

*Petitioners,*

v.

MISSOURI DEPARTMENT OF SOCIAL SERVICES,
DIVISION OF MEDICAL SERVICES,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS
FOR THE WESTERN DISTRICT

## RESPONDENT'S BRIEF IN OPPOSITION

*OF COUNSEL:*
MARY BROWNING
STEVEN M. MITCHELL
Missouri Department of
Social Services
Division of Legal Services
221 West High Street
P.O. Box 1527
Jefferson City, MO 65102
(573)751-1334

CHARLES A. MILLER
*Counsel of Record*
CAROLINE M. BROWN
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202)662-6000

*Attorneys for Respondent*

17 pp

## QUESTION PRESENTED

Whether the Missouri Court of Appeals for the Western District erroneously interpreted Mo. Rev. Stat. § 208.156 as not granting jurisdiction to the state Administrative Hearing Commission to review challenges to state Medicaid regulations after they have been repealed?

## TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

STATEMENT ..... 1

REASONS WHY THE PETITION SHOULD BE DENIED .. 5

CONCLUSION ..... 11

## TABLE OF AUTHORITIES

Page

**FEDERAL CASES**

*Alden v. Maine*, 119 S. Ct. 2240 (1999) ..... 6

*Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) ..... 7

*Harper v. Virginia Department of Taxatio*, 509 U.S. 86 (1993) ..... 8

*Harris v. McRae*, 448 U.S. 297 (1980) ..... 1

*James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) ..... 7, 8, 9, 10

*McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990) ..... 9, 10

*Reich v. Collins*, 513 U.S. 106 (1994) ..... 9

*Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995) ..... 8, 9

**STATE CASES**

*Americare Properties, Inc. v. Chronister*, No. 76,046 (Kan. App. Mar. 17, 1997), *aff'd*, 934 P.2d 139 (1997) ..... 6

*Matter of Brothers of Mercy Nursing and Rehabilitation Center v. Commissioner*, 192 A.D.2d 50, 600 N.Y.S.2d 174 (App. Div. 1993) ..... 6

*Golden Five, Inc. v. Department of Social Services*, 229 Neb. 148, 425 N.W.2d 865 (Sup. Ct. Neb. 1988).....6

*IFIDA and Kent Convalescent Center v. Division of Social Serv.*, C.A. No. 93A-04-019, 653 A.2d 305 (Del. Super. 1994).....6

*Livingston Manor, Inc. v. Department of Social Services, Division of Family Services*, 809 S.W.2d 153 (Mo. App. 1991).....4, 5

*Missouri Department of Social Services v. Alexian Brothers Hospital*, 930 S.W.2d 439 (Mo. App. 1996).....4

*Missouri Department of Social Services v. Great Plains Hospital, Inc.*, 930 S.W.2d 429 (Mo. App. 1996).....3

*Missouri Department of Social Services v. Trinity Lutheran Hospital*, 930 S.W.2d 426 (Mo. App. 1996).....4

*Missouri Health Care Association v. Missouri Department of Social Services*, 851 S.W.2d 567 (Mo. App. 1993).....5

*Westshire Retirement and Healthcare Center v. Department of Public Aid*, 276 Ill. App. 3d 514, 658 N.E.2d 1286 (1995).....6

*Williams v. Hank's Ambulance Service*, 699 So. 2d 1230 (Ala. S.Ct. 1997).....6

## FEDERAL STATUTES AND REGULATIONS

42 C.F.R. § 447.253(e) ..... 1, 6

Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*, ..... 1

42 U.S.C. § 1396a(a)(13)(A) (repealed) ..... 3

## STATE STATUTES AND REGULATIONS

Mo. Rev. Stat. § 208.156 ..... *passim*

Mo. Rev. Stat. § 621.015 ..... 2

13 C.S.R. 70-15.010(15) ..... 3

13 C.S.R. 70-15.010(16) ..... 3

## RESPONDENT'S BRIEF IN OPPOSITION

Respondent Missouri Department of Social Services, Division of Medical Services ("Department" or "State"), respectfully requests that this Court deny the petition for a writ of certiorari in this case. That opinion is reported at 11 S.W.3d 776 and reproduced in the Appendix to the Petition at A-1.

## STATEMENT

Respondent is the state agency in Missouri responsible for administering the State's Medicaid program. Petitioners are eleven hospitals that have elected to participate in Missouri Medicaid.

1. The Medicaid program, Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*, is a cooperative federal-state public assistance program that provides federal financial assistance to participating States "to aid them in furnishing health care to needy persons." *Harris v. McRae*, 448 U.S. 297, 308 (1980); *see* 42 U.S.C. § 1396. The Medicaid program is administered by the States, subject to certain federal guidelines.

Health care providers that choose to participate in a State's Medicaid program are entitled to receive the payment rates set by the State for services provided to Medicaid enrollees. Among other things, federal regulations require state Medicaid agencies to:

> provide an appeals or exception procedure that allows individual providers an opportunity to submit additional evidence and receive prompt administrative review, with respect to such issues as the agency determines appropriate, of payment rates.

42 C.F.R. § 447.253(e).

In Missouri, health care providers may seek review of Medicaid payment rates before the state Administrative

Hearing Commission ("AHC"), which is an independent administrative body tasked by statute with review of various agency actions, including actions by the Department. *See* Section 621.015 *et seq.*, RSMo. In the context of Medicaid, the Missouri General Assembly has given the AHC jurisdiction with respect to the following:

- an action by a provider "whose claims for reimbursement for such services is denied or is not acted upon with reasonable promptness" (§ 208.156.2, RSMo)

- an action by a provider "who is denied participation in any [departmental] program or programs" (§ 208.156.3, RSMo)

- an action by a provider "who is aggrieved by any rule or regulation promulgated by the department of social services or any division therein" (§ 208.156.4, RSMo)

- an action by a provider "who is aggrieved by any rule or regulation, contractual agreement, or decision . . . by the department of social services or any division therein" (§ 208.156.5, RSMo)

Petitions for review before the AHC must generally be filed within "thirty days from the date of mailing or delivery of a decision of the department of social services or its designated division." § 208.256.8, RSMo. Appeals from AHC decisions are available to state Circuit Court and then to the state Court of Appeals and, if transfer is granted, to the Missouri Supreme Court.

2. Effective January 1, 1990, the Department adopted a regulation which established an upper limit on the per diem payment that was allowed for certain inpatient psychiatric services provided by hospitals that participate in the Medicaid

program.[1] The Department adopted this rate (the "psychiatric cap") in an effort to control unexplained growth that had occurred over a period of years in claims for inpatient psychiatric services.

In 1990, shortly after the cap went into effect, Great Plains Hospital brought suit alleging that the Department's adoption of the psychiatric cap had not complied with the procedural requirements of the so-called "Boren Amendment" to federal Medicaid law, 42 U.S.C. § 1396a(a)(13)(A) (repealed). While Great Plains' action was pending before the AHC, two other hospitals also filed petitions for review making the same allegations. Consistent with the thirty-day requirement of § 208.156.8, RSMo, the Trinity Lutheran and Alexian Brothers hospitals both brought suit within thirty days of receiving the determination as to their Medicaid rates for the fiscal year.

In July 1994, the AHC agreed with Great Plains Hospital that the Department's adoption of the cap on inpatient psychiatric services had not complied with the Boren Amendment's "procedural" requisites.[2] On appeal, the Cole County Circuit Court and later the Court of Appeals for the Western District, affirmed. *See Missouri Dep't of Soc. Servs. v. Great Plains Hosp., Inc.*, 930 S.W.2d 429 (Mo. App. 1996).

---

[1] This regulation was initially codified at 13 CSR 70-15.010(15) and was later codified in the same form at 13 CSR 70-15.010(16).

[2] While it was in effect, the Boren Amendment was construed to have a "procedural" component—separate and apart from the "substantive" requirement that a State's Medicaid rates be "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities"—that required States to "find[ ]" and "make[ ] assurances" that its Medicaid rates met the statutory requirements. *See* 42 U.S.C. § 1396a(a)(13)(A). Congress repealed the Boren Amendment as part of the Balanced Budget Act of 1997.

The Court of Appeals upheld the Circuit Court's award of additional payments to Great Plains hospital for inpatient psychiatric services dating back to January 1, 1990, without application of the payment cap. *Id.* On the same day, it also affirmed the Circuit Court's judgments awarding the Alexian Brothers and Trinity Lutheran hospitals additional Medicaid reimbursement from the time that each hospital filed its rate appeal, or October 1, 1992, and September 18, 1993, respectively. *Missouri Dep't of Social Servs. v. Alexian Bros. Hosp.*, 930 S.W.2d 439 (Mo. App. 1996), and *Missouri Dep't of Social Servs. v. Trinity Lutheran Hosp.*, 930 S.W.2d 426 (Mo. App. 1996).

On October 1, 1996, several months after the Court of Appeals' decision invalidating the psychiatric cap, the Department withdrew the regulation. Shortly thereafter, petitioners began to file petitions for review before the AHC claiming that they too were entitled to additional payments from the Department for the entirety of the period from January 1, 1990, until the time the payment cap on inpatient psychiatric services ceased to have effect.

The AHC found that it had jurisdiction to consider the petitioners' complaints under § 208.156.4, RSMo—which gives the Commission the authority to hear actions brought by a provider "who is aggrieved" by a departmental rule or regulation—and held that the psychiatric cap should not have applied to the State's Medicaid payment rates from 1990 onward. On appeal, the Circuit Court of Cole County reversed and the Court of Appeals for the Western District affirmed the reversal, both holding that as a matter of state law the AHC did not have jurisdiction to consider the case.

The Court of Appeals noted that "[t]he AHC is a creature of statute and 'has only such jurisdiction or authority as may be granted by the legislature'." 11 S.W.3d at 780, quoting *Livingston Manor, Inc. v. Department of Soc. Servs., Div. of Family Servs.*, 809 S.W.2d 153, 156 (Mo. App. 1991). The court held that AHC jurisdiction over actions in which a provider claimed to be "aggrieved by a rule or regulation" of

the Department is limited to challenges to "a statement of policy or interpretation of law *of future effect*." *Id.* (emphasis added), citing *Missouri Health Care Ass'n v. Missouri Dep't of Soc. Servs*, 851 S.W.2d 567, 569 (Mo. App. 1993). It held that "[i]f the General Assembly intended to confer jurisdiction to the AHC over cases where a person was injured or harmed in the past by a prior regulation . . . , it would have explicitly done so." *Id.* at 781. Because petitioners—unlike the hospitals in *Great Plains* and the two companion cases—"did not challenge the validity of the Medicaid reimbursement cap on psychiatric services" but instead only "sought additional reimbursement over the reimbursements they actually received in prior rate periods," the court concluded that the AHC did not have jurisdiction to review their complaint under 208.156.4. *Id.* at 780.[3]

The Missouri Supreme Court denied the motion for transfer on March 21, 2000.

## REASONS WHY THE PETITION SHOULD BE DENIED

The petition should be denied because it does not present any question of federal law, much less a substantial question of the sort appropriate for review on certiorari.

1. Petitioners do not contend that the Missouri appellate court's construction of state law violates any provision of the federal Medicaid Act. Nothing in Title XIX either now or before the repeal of the Boren Amendment required States to award retroactive damages if a provider were to prevail in a challenge to Medicaid payment rates.

---

[3] The Court of Appeals also agreed with the AHC and the Circuit Court that the AHC did not have jurisdiction to review the action under 208.156.2, RSMo, because the hospitals had not filed their claim within 30 days of a departmental rate decision. *Id.* at 781.

Certainly, no such requirement is found in 42 C.F.R. § 447.253(e), which provides only that State Medicaid Agencies must have an appeals process "with respect to such issues as the agency determines appropriate" and is silent as to what kinds of relief, if any, must be available.

The decision whether to award damages to health care providers in Medicaid rate challenges is left to the individual States, and is not one imposed by Congress. *Cf. Alden v. Maine*, 119 S. Ct. 2240 (1999) (Congress does not have Article I authority to abrogate state sovereign immunity in state court). The case law therefore has examples both of instances where state processes have awarded retroactive relief, and those where they have not. Petitioners cite examples only of the former category to this Court. See Petition at 14-15.

What petitioners do not discuss are the number of cases in which state courts, having found that a State's Medicaid rates did not conform to federal standards, granted prospective relief but nevertheless denied claims for retroactive rate increases either on grounds of sovereign immunity[4] or because the provider failed to comply with state administrative processes.[5]

---

[4] *See, e.g., Williams v. Hank's Ambulance Serv.*, 699 So.2d 1230 (Ala. S.Ct. 1997) (holding that State had not waived its sovereign immunity in claims for retroactive reimbursement); *Westshire Retirement and Healthcare Center v. Department of Public Aid*, 276 Ill. App.3d 514, 658 N.E.2d 1286 (1995) (same).

[5] *See, e.g., Golden Five, Inc. v. Dep't of Soc. Servs.*, 229 Neb. 148, 425 N.W.2d 865 (Sup. Ct. Neb. 1988) (court cannot award retroactive rate increases for failure to comply with federal law when provider failed to timely appeal those rates through state administrative process); *Matter of Brothers of Mercy Nursing and Rehabilitation Center v. Commissioner*, 192 A.D.2d 50, 53 n.3, 600 N.Y.S.2d 174, 176 n.3 (App. Div. 1993) (same); *Americare Properties, Inc. v. Chronister*, No. 76,046, slip op. at 18 (Kan. App. (continued...)

The variation in these cases is not due to any disagreement as to what federal law requires but results only from the application of different state laws to different factual scenarios. In this case, the Missouri Court of Appeals for the Western District decided a question of state law—whether the state legislature had given the state Administrative Hearing Commission jurisdiction over provider claims for retroactive rate increases after the offending regulation has been repealed—that does not present a federal issue appropriate for review by this Court.

2. The *Beam* case relied upon by petitioners does not turn this state law question into a federal case. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), concerned whether a principle of law first announced by this Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), had to be given retroactive effect by Georgia state courts. The controversy centered on a Georgia statute that provided for different tax treatment for liquor manufacturers depending on whether those manufacturers were located in or out-of-state. *Beam*, 501 U.S. at 532. A similar law enacted by Hawaii had previously been declared unconstitutional by this Court in *Bacchus*. In light of *Bacchus*, the Georgia court held that the state statute was unconstitutional, but refused to apply the ruling retroactively since the statute was assumed to be constitutional for the years in which the State had collected the taxes. 501 U.S. at 533. In *Beam*, this Court held that because it had applied its ruling in *Bacchus* retroactively, the Georgia courts were also bound to apply the rule retroactively to

---

Mar. 17, 1997), *aff'd*, 934 P.2d 139 (1997) (same); *cf. IFIDA and Kent Convalescent Center v. Division of Social Serv.*, C.A. No. 93A-04-019, 653 A.2d 305 (Del. Super. 1994) (unpublished), 1994 WL 632828 (state court does not have jurisdiction to review provider's challenge that State failed to comply with federal law).

similarly situated parties who were "not barred by procedural requirements or res judicata." 501 U.S. at 543, 544.

In their attempt to "federalize" this case, petitioners turn the holding of *Beam*—which the decision itself called a "narrow" one, 501 U.S. at 544—into a sweeping requirement that would require state courts to grant retroactive relief in virtually all circumstances where some other party somewhere has previously been awarded such relief. *Beam* in no way imposes such a federal requirement on state court adjudication.

First, as subsequent cases have explained, *Beam* is a Supremacy Clause case: it sets forth the obligations of state courts to follow the decisions of this Court, and holds that this Court's application of a rule of federal law to the parties before it requires every court, including state courts, to give retroactive effect to that decision. *See Harper v. Virginia Department of Taxation*, 509 U.S. 86, 96 (1993); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 751 (1995). As the Court stated in *Harper*: "The Supremacy Clause . . . does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive application of their own interpretations of state law, . . . cannot extend to their interpretations of federal law." 509 U.S. at 100; *see also Reynoldsville Casket*, 514 U.S. at 751 (state court's refusal to follow this Court in applying a rule of federal law retroactively "violates the Constitution's Supremacy Clause").

In this case, there is no Supremacy Clause issue, because this Court has never held that procedural violations of the Boren Amendment require retrospective relief. The Missouri Court of Appeals' retroactive fee awards to the Great Plains, Alexian Brothers, and Trinity Lutheran hospitals in 1996 was based on a question of state law—*i.e.*, whether and on what bases the AHC had jurisdiction to review their challenges to the psychiatric cap—not federal law. 930 S.W.2d at 431. The Supremacy Clause, and the *Beam* case,

therefore have no bearing on that court's subsequent interpretation of the same state law.

There is another, independent reason, that the federal retroactivity doctrine of the *Beam* case does not apply here. As the Court stated in both *Beam* and *Reynoldsville Casket*, general principles of retroactivity do not require a state court to overlook or overcome procedural bars to relief. *See Beam*, 501 U.S. at 544, *Reynoldsville*, 514 U.S. at 759.

As the Court explained in *Reynoldsville Casket*:

> "Suppose a State collects taxes under a taxing statute that this Court later holds unconstitutional. Taxpayers then sue for a refund of the unconstitutionally withheld taxes. Retroactive application of the Court's holding would seem to entitle the taxpayers to a refund of taxes. But what if a pre-existing, separate, independent rule of state law, having nothing to do with retroactivity—a rule containing certain procedural requirements for any refund suit—nonetheless barred the taxpayers' refund suit. *See McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18, 45 (1990); *Reich v. Collins*, 513 U.S. 106, 111 (1994). Depending on whether or not this independent rule satisfied other provisions of the Constitution, it could independently bar the taxpayers' refund claim. *See McKesson, supra*, at 45." 514 U.S. at 756.

Here, there is a "pre-existing, separate, independent" rule of law that bars petitioners' claims for retroactive relief. As the Court of Appeals held, there is no state administrative process for awarding retroactive rate increases where the regulation complained of has already been repealed. Otherwise, providers could come in years after they have provided services and received payment and complain that they would have liked to receive a higher rate. For a program

like Medicaid which is funded through annual appropriations from the state legislature, "[s]uch a policy would confound the budgetary process of state government." 11 S.W.3d at 781.

To the extent that petitioners were treated differently by the state courts, it is because they acted differently. Petitioners accepted Medicaid payments for the six years that the payment cap on psychiatric services was in existence without ever challenging the validity of the regulation as Great Plains hospital did. Nor did they ever file a rate appeal within 30 days of being informed of their Medicaid rates, as did Trinity Lutheran and Alexian Brothers hospitals. The Court of Appeals' determination that the petitioners' claims were untimely is purely a question of state law, and nothing in the *Beam* case requires the Missouri state courts to ignore this jurisdictional bar to their complaint.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:

Mary Browning
Steven M. Mitchell
Missouri Department of
Social Services
Division of Legal Services
221 West High Street
P.O. Box 1527
Jefferson City, MO 65102
(573)751-1334

Charles A. Miller
*Counsel of Record*
Caroline M. Brown
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202)662-6000

*Attorneys for Respondent*

Dated: July 20, 2000